

# **EXHIBIT 49**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

ORLY GENDER in her individual capacity and on  
behalf of the Orly Genger 1993 Trust (both in its  
individual capacity and on behalf of D & K  
Limited Partnership),

Plaintiff,

- against -

DALIA GENDER, SAGI GENDER, LEAH  
FANG D & K GP LLC, and TPR INVESTMENT  
ASSOCIATES, INC.,

Defendants.

Index No.: 109749/09

Hon. Barbara Jaffe

Motion Sequence Nos. 61 and 62

**NOTICE OF APPEAL**

**PLEASE TAKE NOTICE** that plaintiff Orly Genger in her individual capacity and on  
behalf of the Orly Genger 1993 Trust (both in its individual capacity and on behalf of D & K  
Limited Partnership), hereby appeals to the Appellate Division of the Supreme Court of the State  
of New York, First Judicial Department, from the Order dated March 25, 2019 by the Honorable  
Barbara Jaffe of the Supreme Court of the State of New York, County of New York (IAS Part  
12), entered in the Office of the New York County Clerk on March 25, 2019 (NYSCEF Dkt.  
Nos. 1593 and 1594) (the “Order”). A true and correct copy of the Order is attached hereto as  
Exhibit A.

Dated: New York, New York  
April 26, 2019

KASOWITZ BENSON TORRES LLP

By: /s/ Michael Paul Bowen

Michael Paul Bowen

Andrew R. Kurland

1633 Broadway

New York, New York 10019

(212) 506-1700

*Attorneys for Plaintiff-Appellant*

To: All Counsel of Record (By ECF)

# Exhibit A

SUPREME COURT OF THE STATE OF NEW  
YORK NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12  
*Justice*

-----X

ORLY GENDER, in her individual capacity and on behalf  
of the ORLY GENDER 1993 TRUST (both in its  
individual capacity and on behalf of D & K Limited  
Partnership),

INDEX NO. 109749/2009  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 61, 62

Plaintiff,

DECISION AND ORDER

-v-

DALIA GENDER, SAGI GENDER, LEAH FANG, D&K  
GP LLC, and TPR INVESTMENT ASSOCIATES INC.,

Defendants.

-----X

Defendants Sagi Genger, D&K GP LLC, and TPR Investment Associates Inc. move pursuant to CPLR 4403 for an order confirming the May 16, 2017, report and recommendation of a judicial hearing officer, sitting as a special referee, so ordered by him on May 19, 2017. Plaintiff opposes and moves for an order rejecting the report and recommendation.

I. PERTINENT BACKGROUND

By decision and order dated April 8, 2016, plaintiff was awarded summary judgment on her cause of action, *inter alia*, for a breach of fiduciary duty, and a special referee was directed to hear and report with recommendations “regarding the damages arising from defendants’ breach

of their fiduciary duties to plaintiff and the value of the subject shares that were transferred in the February 2009 auction.” (NYSCEF 1518). That decision was affirmed. (147 AD3d 443 [1<sup>st</sup> Dept 2017]). At that auction, 240 shares of TPR had been sold and bought back by TPR for \$2.2 million.

Then, by decision and order dated September 1, 2016, I denied plaintiff’s motion for an order clarifying the April 2016 order and conforming the pleadings to the evidence adduced to that date at the trial before the assigned judicial hearing officer. Plaintiff essentially alleged that it had been shown at the trial that Dalia Genger’s 51 percent interest in TPR that she was to have received from Arie Genger in resolution of their 2004 divorce, had never been assigned and transferred to her but was retained by TPR with its TRI shares. Thus, plaintiff maintained that the TRI shares should be considered for purposes of determining her damages for the breach of fiduciary duties. In support, she offered evidence that the August 22, 2008, stock purchase agreement and side letter agreement whereby TPR sold the family interest in TRI to the Trump Group, were “part and parcel of” the foreclosure and UCC sale of the D&K note. I held as follows:

Here, numerous considerations, including the prejudice alleged by defendants, warrant the denial of plaintiff’s application, not the least of which is her potential double recovery: Should the motion be granted and plaintiff prevail on the amended claim, she would receive the value of the TRI shares that she had already been found to have “monetized” in her settlement with the Trump Group. Plaintiff’s failure to address these significant obstacles to her application precludes a reply, which in any event, was never sought, and given the extensive litigation of these cases, plaintiff should have anticipated that defendants would advance this argument, as well as the other arguments that the dismissal of the claim for breach of fiduciary duty in the 2010 action bars the proposed amendment, and that her contrary positions estop her from advancing her new position.

(NYSCEF 1392).

In observing that plaintiff had monetized the value of her TRI shares in her settlement

with the Trump Group, I relied on *Genger v Genger*, 76 F Supp 3d 488, 491 (SDNY 2015), an unrelated litigation brought by Sagi against plaintiff. There, the court rejected plaintiff's argument that a 2004 agreement she had entered into with Sagi to provide financial support for their mother, Dalia Genger, was void for lack of consideration, observing that the consideration was the transfer of Dalia's TRI shares to the two siblings' trusts as part of their parents' 2004 divorce agreement. In discrediting plaintiff's denial that her trust had received her portion of the shares, the court found that there was no "genuine dispute as to whether [plaintiff] has so benefited [from her trust's receipt of a beneficial interest in the TRI shares]" and that her claims to beneficial ownership of those shares individually and as trust beneficiary "enabled her to obtain \$32.3 million from the Trump Group under the 2013 Settlement agreement."

That decision was affirmed by the Second Circuit on September 29, 2016. In addressing plaintiff's denial that she had received any money in exchange for relinquishing her rights to the TRI shares she had received, the Court stated that "surely any \$32 million transaction for her shares would confer upon her more than a peppercorn, which is all we need to conclude (and all we do conclude) as to the extent of any benefit she received." The Court also observed that plaintiff "does not dispute that she was part of a group that settled a claim involving the shares she was to receive as part of the Divorce Stipulation," and held that plaintiff had "benefitted from the shares regardless of whether the settlement money went to Orly, as a gift to Arie, or to pay debts owed to her litigation partners." (*Genger v Genger*, 663 Fed.Appx. 44, 49 [2d Cir 2016]).

On March 16, 2017, I denied plaintiff leave to reargue the September 1 decision. (NYSCEF 1502).

The trial before the judicial hearing officer was held on August 2, 3, 8, 9, 10, and 11, 2016. Plaintiff's witnesses were plaintiff, Sagi Genger, Leah Fang, Dalia Genger, and Mark Hirsch. Sagi called the sole expert witness. The JHO stated that the sole issue for resolution was the value of 240 TPR shares that were sold at the "sham" UCC auction held on February 2, 2009, and that based on the testimony of defendants' expert witness, he found that plaintiff had sustained no damages. According to the expert, no reasonable prospective investor would pay more than the \$2.2 million obtained at the auction for a minority interest in a company that had been losing money for many years, was not paying dividends, and would not likely pay dividends, and that no prospective investor would invest in a company with shareholders like the Gengers, who persistently engage in resource-draining litigation. He also relied on the economic recession. (NYSCEF 1517).

## II. DISCUSSION

### A. Preliminary issues

Defendants misconstrue the April 8 decision and order as calling for a valuation of the TPR shares as of the time of the auction. Rather, the use of the word auction in the second clause ("the value of the subject shares that were transferred in the February 2009 auction") identifies the shares as those sold at the auction, without an indication that the value is to be assessed as of that date. Had it been otherwise, there would have been no need for expert testimony because the value on the day of the auction would be the \$2.2 million at which TPR bought back the shares. Moreover, as the auction was a sham and conducted in a commercially unreasonable manner, the price at which the shares were bought back provides no reliable or equitable basis on which to assess damages brought about by defendants' misconduct. Consequently, absent any dispute that the sham auction was conceived on August 22, 2009, that is the date of the breach and thus, the

date on which the assessment of damages commences. Nonetheless, for the reasons underlying my September 2016 decision referenced *supra*, the TRI shares are not part of plaintiff's damages.

Plaintiff misconstrues the Second Circuit's September 2016 decision as foreclosing defendants' claim that she had monetized her interest in the TRI shares. In concluding that the \$32 million transaction for plaintiff's TRI shares had conferred upon her "no more than a peppercorn," the Court found that she had received a benefit therefrom, certainly more than a peppercorn. The Court did not state that the shares were not worth \$32 million, and did not hold that plaintiff had not monetized her interest in the TRI shares.

B. Burden of proof on damages for breach of fiduciary duty

It is well-settled that the plaintiff bears the burden of proving damages, and that where there is a breach of fiduciary duty, "the normally stringent rules for damage calculation are relaxed." (NY PJI 3:59, at 644 [2019]). Consequently, the court has "significant leeway in ascertaining a fair approximation of the loss so long as [its] methodology and findings are supported by inferences within the range of permissibility." (*Id.*, and cases cited therein). Moreover, where the calculation is difficult due to the defendant's "misconduct, some uncertainty may be tolerated." (*Id.*, citing *Wolf v Rand*, 258 AD2d 401 [1<sup>st</sup> Dept 1999]). Nonetheless, the plaintiff must present "competent evidence" of loss sufficient to result in an award that is not "merely speculative." (*Id.*, and cases cited therein).

C. Contentions

1. Plaintiff (NYSCEF 1418, 1495, 1526, 1564)

Plaintiff argued to the JHO that she had met her burden of proving her damages by presenting defendant Sagi's admissions and other "credible evidence" of TPR's "valuable assets"



which include the TRI shares. She also maintained that she had proven “that a willing buyer would pay a reasonable price in the many millions for such assets,” relying on the payment by the Trump Group of \$44 million for TRI shares, and that defendants’ assertion of TPR’s liabilities was unreliable.

Otherwise, plaintiff attacked defendants’ expert testimony as based on unreliable and wrongfully withheld evidence, thus arguing that the burden thereby shifted to defendants by virtue of adverse inferences to be drawn. She claimed that defendants were unable to meet her proof and raised alternative and invalid theories. She also deemed irrelevant the 2009 recession on which the expert had partly relied, and criticized his reliance on defendants’ 2008 corporate tax returns, contending that the 2007 return was more reliable as it was “more likely” to have been prepared before the foreclosure sham had started in late 2008. Thus, she asserted, the TRI shares, which were not sold to the Trump Group until after the sham auction was conceived, are properly considered as part of her damages.

For the same reasons, plaintiff argued that TPR’s liabilities should not be considered, and sought to rely on adverse inferences for her case on damages, while also maintaining that TPR’s net operating losses must be considered. She bases her motion for an order rejecting the JHO’s report on the same arguments.

2. Defendants (NYSCEF 1516, 1559)

Defendants assert that the JHO correctly reported that the shares had no value based on the testimony of their expert and observe that plaintiff had offered no expert evidence to rebut his testimony. They maintain that the measure of damages is that employed where there is a breach of contract or conversion.

D. Analysis

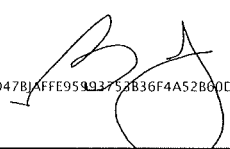
Notwithstanding the relaxed burden of proving damages here, lessened even further by Sagi's wrongful conduct, the JHO was apparently stymied in discerning any competent evidence of loss presented by plaintiff sufficient to award her damages. While plaintiff was not required to present expert evidence, she took the risk of failing to offer a clear factual or evidentiary basis for awarding her damages and did not rebut defendants' expert opinion. She offers TPR's 2007 tax return without any explanation, expert or otherwise, of how it reflects the value of her portion of the 240 shares even in August 2008, and without considering the TRI shares. Thus, as plaintiff does not sustain her burden of demonstrating the amount of her damages, she provides no basis for rejecting

Accordingly, it is hereby

ORDERED, that defendant's motion for an order confirming the report of the judicial hearing officer is granted as to the result only; it is hereby

ORDERED, that plaintiff's motion for an order rejecting the report of the judicial hearing officer is denied; and it is further

ORDERED, that plaintiff's motion for an award of damages is therefore denied.

<u>3/25/2019</u>			
DATE		BARBARA JAFFE, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

# Supreme Court of the State of New York

## Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
Orly Genger in her individual capacity and on behalf of the Orly Genger 1993 Trust (both in its individual capacity and on behalf of D & K Limited Partnership) <div style="text-align: center;">- against -</div> Dalia Genger, Sagi Genger, Leah Fang, D&K GP LLC, and TPR Investment Associates, Inc.		<div style="border: 1px solid black; height: 60px; margin-top: 10px;"></div> <div style="text-align: center; font-size: small;">Date Notice of Appeal Filed</div>
<b>Case Type</b>		<b>Filing Type</b>
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278 <input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Family Court <input type="checkbox"/> Real Property (other than foreclosure)	<input checked="" type="checkbox"/> Business Relationships <input type="checkbox"/> Domestic Relations <input type="checkbox"/> Mortgage Foreclosure <input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Commercial <input type="checkbox"/> Election Law <input type="checkbox"/> Miscellaneous <input type="checkbox"/> Taxation
<input type="checkbox"/> Contracts <input type="checkbox"/> Estate Matters <input type="checkbox"/> Prisoner Discipline & Parole <input checked="" type="checkbox"/> Torts		

Informational Statement - Civil

Appeal			
Paper Appealed From (Check one only):		If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.	
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment	<input type="checkbox"/> Order <input checked="" type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court		County: New York	
Dated: 03/25/2019		Entered: 3/25/2019	
Judge (name in full): Hon. Barbara Jaffe		Index No.: 109749/2009	
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final		Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury	
Prior Unperfected Appeal and Related Case Information			
<p>Are any appeals arising in the same action or proceeding currently pending in the court? <span style="float: right;"><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</span></p> <p>If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.</p> <p>Un-perfected appeal first noticed 4/5/2017; time to perfect last extended by order dated April 23, 2019 (M-603); Only intends to consolidate with this appeal</p> <p>Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:</p> <p>Other proceedings between these parties are pending in other courts, but they are not related to this action.</p>			
Original Proceeding			
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus			Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:			
Proceeding Transferred Pursuant to CPLR 7804(g)			
Court: Choose Court		County: Choose County	
Judge (name in full):		Order of Transfer Date:	
CPLR 5704 Review of Ex Parte Order:			
Court: Choose Court		County: Choose County	
Judge (name in full):		Dated:	
Description of Appeal, Proceeding or Application and Statement of Issues			
<p>Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.</p> <p>Appeal of damages verdict awarding plaintiff-appellant no damages.</p>			

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The award of no damages should be reversed because, among other things, the trial court applied the wrong burden of proof, erroneously excluded relevant evidence, and erroneously credited an unreliable expert opinion that was fallacious and unreliable on its face. The order below should be reversed and plaintiff-appellant should be awarded the damages proved at the inquest.

### Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Orly Genger	Plaintiff	Appellant
2	Dalia Genger	Defendant	None
3	Sagi Genger	Defendant	Respondent
4	Leah Fang	Defendant	None
5	D&K GP LLC	Defendant	Respondent
6	TPR Investment Associates, Inc.	Defendant	Respondent
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Informational Statement - Civil

Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Michael Paul Bowen / Kasowitz Benson Torres LLP			
Address: 1633 Broadway			
City: New York	State: NY	Zip: 10019	Telephone No: 212-506-1903
E-mail Address: MBowen@kasowitz.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: John Dellaportas / Kelley Drye & Warren LLP			
Address: 101 Park Avenue			
City: New York	State: NY	Zip: 10178	Telephone No: 212-808-7897
E-mail Address: jdellaportas@kelleydrye.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 3, 6			
Attorney/Firm Name: Ira Daniel Tokayer			
Address: 420 Lexington Ave. Suite 2400			
City: New York	State: NY	Zip: 10170	Telephone No: 212-695-5250
E-mail Address: imtoke@mindspring.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 5			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

Informational Statement - Civil